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FILED
JUL 9 1964
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. [redacted] 167

ATLANTIC CITY, a municipal corporation of the State of New Jersey,

Petitioner,

v.

ANDREW CAPOROSSI,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, FOR THE THIRD CIRCUIT.

CAMPBELL, MANGINI, FOLEY & LEE,
Attorneys for Respondent.
601 Bangs Avenue,
Asbury Park, N. J.

RALPH W. CAMPBELL,
Of Counsel.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963.

No. 1202.

ATLANTIC CITY, a municipal corporation of the State of New Jersey,

Petitioner,

v.

ANDREW CAPOROSSI,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Citations to Opinions Below.

The opinion of the District Court (R. 40a-80a) is reported at 220 F. Supp. 508 (1963). The opinion of the Court of Appeals is reported at 328 F. 2d 620 (1964).

Questions Presented.

1. Whether a Writ of Certiorari should issue where the courts below decided a provincial tort issue in accord with the most recent holdings of the highest court of the State of New Jersey.

2. Whether there is conflict among the circuits as to the application of the doctrine of *Erie R. Co.* v. *Tompkins* which led to error in the courts below.

3. Whether the United States Supreme Court should review interpretations of local law made by the District Court and unanimously affirmed by the Court of Appeals where the District Court Judge was a member of the New Jersey Bench and Bar prior to his appointment to the Federal Bench.

Counter-statement of the Case.

The factual basis for the respondent's action against the petitioner, was as follows: On August 24, 1960, the respondent, while lawfully (20b, 22-28) in the ocean adjoining the beach under the exclusive control of the petitioner (R. 191, 19-23), struck his head on submerged pipes sustaining serious personal injuries (R. 559, 1-564, 18).[1] These pipes were installed pursuant to a permit issued in March of 1944 by Atlantic City to a former owner of the New Davis Hotel, Rose Fleischer (R. 361, 4-362, 5; 31b). They were exposed to view at low tide for a long period of time prior to August 24, 1960. However, shortly after the tide would rise, they became covered so that they were not visible to persons using the beach (17b, 36-18b, 3; 34b-39b; R. 374, 19-375, 23). The pipe lines ran from the ocean at St. Charles Place to the property of the New Davis Hotel (destroyed by fire in 1952) which was located on the lot purchased by the defendants Gerber in 1954. The permit for the lines was

[1] Citations to the Respondent's Appendix, Petitioner's Brief, Petitioner's Appendix and the Transcript of Record are to the page and line thereof. The lines are counted from the first line of text and not from the headings on the page except where the lines are numbered in the margin.

adopted by resolution and filed with the City Clerk in 1944 (33b). The fact that these pipe lines constituted a hazard to bathers was a matter of common knowledge (R. 167, 7-12; 2b; 28-29). The Commissioner in charge of beach maintenance (7b, 7-20) and the Commissioner in charge of public safety (R. 135, 18-23) knew that salt water pipes were employed by various hotels and of their exposure as previously described (R. 290, 2-13). Commissioner Casey, in charge of beach maintenance, knew not only that salt water lines were not used since 1934, but that they constituted a hazard to bathers and, in particular, knew of the presence of exposed pipes between Garden Pier and the Steel Pier (R. 200, 3-201, 9; R. 206, 10-20). This area includes St. Charles Place, the site of the plaintiff's accident. Captain Stetser, the chief life guard at St. Charles Place, also knew of the presence of exposed pipes in the vicinity for a period of 6 years prior to August 24, 1960 (25b, 3-10). He reported the presence of these pipes to his superior, Richard Hughes, chief of the beach patrol of Atlantic City, with the admonition that the pipes constituted a hazard to bathers and that the city should get rid of them (25b, 38 to 26b, 20). No action was ever taken (R. 379, 3-10; 26b, 22-26; R. 415, 14-416, 10). In 1959, Bert Eslow, a lifeguard who later became a medical assistant at the beach, knew of and aided persons who sustained injuries on exposed pipes at St. Charles Place (11b, 8-19). He, too, regarded them as a hazard and reported them to Captain Stetser (R. 348, 3-18; 24b, 13 to 25b, 7). Despite the dangerous condition created by these pipes, signs were not maintained concerning their presence either at the entrance to the beach, on the beach or in the water where the pipes were located (19b, 37-20b, 5; 11b, 21-28; R. 345, 6-9). Despite Captain Stetser's recommendation about removing the hazard and subsequent

inspection of the hazard by members of the city engineering department, nothing was done to correct the situation (13b, 6, 28; 25b, 26b). As a result, it was not uncommon for lawful users of the beach at St. Charles Place to enter the ocean and, while bathing, injure themselves on pipes which were beneath the surface of the water but above the surface of the ocean bed (11b, 6-14; R. 348, 3-18; 14b, 10-26; 18b, 19-36).

Although no charge was made to persons using the beach, luxury taxes were imposed by the petitioner on the hotels and other merchants which were paid by guests and consumers (91a, 18-31). In furtherance of its endeavors to entice and attract people to the resort, the city advertised in newspapers extensively so as to reach about fifty million persons (100a, 3-25; 108a, 8-109a, 19) and in 1959 and 1960 spent over $185,000 annually on this medium (101a, 23-39; 103a, 35-104a, 6). The amount collected in luxury taxes for 1959 was $1,797,457.40 and in 1960 was $1,781,531.07 (113a, 30-114a, 40). Two of the city Commissioners, Casey and Kerstetter, testified that the luxury taxes are passed on to visitors to the city or, as Commissioner Casey testified: "They pay it and we spent it" (91a-32). As a direct result of the use of its resort facilities and, in particular, the beach in question, it was admitted by the Commissioners that the city obtains an economic benefit (87a, 25-27; 91a, 37-92a, 10; 355a, 41-48).

In addition to the luxury taxes, Atlantic City also exacted revenue from merchants in the form of mercantile license fees as does most other municipal corporations in New Jersey (93a, 31-95a, 5). However, it is interesting to note the relationship between fees charged for common business activities and those charged for operating enterprises commonly associated with the city's status as "Vaca-

tion Capital of the Nation" and "Convention Capital of the World" (229a). For example, the annual license fee for (1) establishments conducting group games of skill having seating facilities is $3,000.00; (2) auction stores is $1,000.00; (3) a circus is $1,000.00; (4) slot machine parlors is $500.00; (5) each beach chair is $1.00; (6) Astrologers is $750.00; (7) each exhibit charging an admission fee or accepting donations is $250.00; (8) any Ocean Pier charging admission is $1,000.00; (9) Phrenologists is $300.00; (10) a Rolling Chair station is $500.00; (11) each "guess your weight" scale is $150.00; (12) each "kiddie ride" is $100.00; (13) each skee ball alley is $10.00; (14) a hot dog stand is $50.00.

In contrast to these license fees, the business establishments (found in almost every municipality) are taxed at relatively nominal rates, e.g., the annual license fee for (1) a barber shop is $15.00; (2) a bakery shop is $15.00; (3) a book dealer is $15.00; (4) a furniture store is $35.00; (5) a jewelry store is $15.00; (6) the sale of meat retail is $15.00; (7) a radio store is $25.00; (8) the sale of shoes is $15.00; (9) the sale of sporting goods is $15.00; (10) tailoring merchants is $15.00; (11) sale of wallpaper is $15.00; (12) undertakers' establishment is $25.00. (The ordinance is set forth in toto at 294a.) In the words of the District Engineer of the Corps of Engineers of the United States Army which surveyed and justified the need for protecting Atlantic City from extinction due to oceanic erosion, by stating "* * * the resort business is the only substantial reason for the existence of the city" (348a, 17-18).

The beach under consideration was obtained by Atlantic City from individual grantors in 1900 (285a-293a). The City covenanted that the beach was to be used as a park or place for public resort and recreation (290a, 29-32), and that the grantors' land would not be condemned (288a, 26-

36). The deed recited that the transfer was for the benefit and advantage of the grantors (288a, 31-33). Among other benefits, they were permitted to lay down and maintain pipes under the beach to convey salt water to their remaining untransferred parcels of land (289a, 36-290a, 5). The land under the high water line was purchased by it from the State of New Jersey for the sum of $21,062.50 in 1907 (302a-308a). The deed recited that the lands conveyed were to be used solely for a park or place of public recreation and resort (305a, 15-21). The deeds here involved do not suggest in any manner or form that the land conveyed could not be used to exploit this natural resource for the direct or indirect pecuniary benefit of Atlantic City. Neither of the deeds require that the beach facilities be provided to the public free of charge or that the lands not be utilized commercially; nor is any restriction placed upon the ability of Atlantic City to lease, rent, or otherwise alienate the lands so long as the use remains within the provisions of the deed.

The respondent, Andrew Caporossi, instituted suit in the United States District Court against the petitioner, City of Atlantic City, and others on July 19, 1961. The action was based on two theories: First, Atlantic City was negligent in maintaining, operating and controlling the beach on which the respondent was injured (10a, 34) and secondly, Atlantic City maintained a nuisance on the beach which caused injuries to the respondent (11a, 23). Atlantic City filed an Answer setting forth nine separate defenses (16a-18a) of which only the Ninth Defense (dealing with statutory immunity) was seriously urged during the trial below. The trial court decided as a matter of law at the end of the entire case, that the operation of the beach by the petitioner Atlantic City was a proprietary function and therefore, that R. S. 40:9-2 (N. J. S. A.) (R. 1251,

2-1255, 12) did not apply. The case was submitted to the jury, as far as the petitioner is concerned, on three issues: negligence (175a, 21-177a, 19), nuisance (177a, 20-178a, 6) and damages (181a, 27-184a, 12). No objection was taken by the petitioner to the Court's instructions on the issue of nuisance. At the end of its deliberations, the jury returned a verdict of $600,000.00 in favor of the respondent against Atlantic City (191a). The petitioner's motion for judgment N. O. V. or for a new trial (35a-39a) were denied (81a) by the trial court in a written opinion (40a-80a). The opinion of the District Court was unanimously affirmed by the Court of Appeals on the opinion below (petitioner's Appendix A).

Summary of Argument.

I. The petitioner has failed to show that the courts below clearly erred and unreasonably decided a provincial issue of tort law in finding that applicable state law required a determination that in operating and maintaining a bathing beach, the municipality was engaged in a proprietary activity.

A. The issue with which the courts below were concerned was of local concern only in that it characterized a particular bathing beach as a proprietary function rather than deciding grave public issues of general importance.

B. The courts below correctly ascertained the state law and applied it to the case at bar without error.

II. There is no conflict among the circuits as to the application of the rule of *Erie R. Co. v. Tompkins* which led to confusion and error by the courts below.

III. The court should not disturb the findings of local New Jersey law made by the District Court, the Judge of which was a member of the Bar and Bench of New Jersey prior to his appointment to the Federal Bench and where such findings were affirmed *per curiam* by the Court of Appeals.

Reasons for Denying the Writ.

POINT I.

The Court should deny certiorari because the decisions below did not decide an important state question in a way in conflict with applicable state law.

A. The Courts below did not decide a state question of gravity and general public importance.

United States Supreme Court Rule 19, 1(b), 28 U. S. C. provides that this Court may exercise its discretion to grant a Writ of Certiorari only if ". . . there are special and important reasons therefor" such as where "a court of appeals . . . has decided an important state or territorial question in a way in conflict with applicable state or territorial law . . ." Thus the petitioner's burden of persuasion is two-fold. First, he must demonstrate the importance of the state question and second, he must demonstrate the conflict between the decision and the applicable state law. In the instant case, neither burden can be sustained.

The issue with which the courts below were concerned was simple. The New Jersey court of last resort has indicated that it is only where an activity of a municipal corporation is characterized as "governmental" rather than "proprietary", may the municipality escape liability for its negligence. *Weeks* v. *City of Newark*, 62 N. J. Super.

166, 162 A. 2d 314 (App. Div. 1960), affirmed o.b. 34 N. J. 250, 168 A. 2d 11 (1961) and the cases cited therein. The only issue before the courts below was whether Atlantic City's activity was proprietary, thereby rendering it liable in negligence to the plaintiff or governmental, thereby rendering it immune. It is respectfully submitted that this provincial issue is of local concern only and does not merit review by the nation's highest court. We are not here concerned with a legal question of national importance which effects the lives, liberties and rights of United States citizens.

The influx of some thirteen million visitors to Atlantic City annually is not disputed, nor is the fact that the gross receipts from these visitors in 1947 was estimated at $500,000,000.00 in addition to the $1,870,000.00 the City annually collects in luxury taxes from the hotels and patrons. The amounts of money connected with Atlantic City's resort business are staggering and to assert that the decisions below will affect the economic stability of Atlantic City as well as the entire Atlantic seacoast resort area is somewhat of an exaggeration of the impact of the verdict. Likewise, any increases in the City's liability insurance policy premiums will not create a situation effecting the economic stability of Atlantic City. On the matter of insurance, *Weeks* noted that "The availability of liability insurance has increased confidence in the ability of local government to carry on without special immunity" 62 N. J. Super. at 182. Furthermore, nothing more than the petitioner's representations of insurance premium increases has been presented to this Court.

One of the resort areas of New Jersey of the greatest historical, military, navigational and recreational significance is Sandy Hook. Many state residents and visitors

are attracted to this area annually. So integrally woven with state interest is Sandy Hook that in 1950 the New Jersey Legislature created the Sandy Hook Reservation Authority as an "essential government function of the State" L. 1950, c. 290, p. 972, sec. 2, R. S. 13:15-2 (N. J. S. A.). Among the powers of the Authority is the power to "sue and be sued in its own name" L. 1950, c. 290, p. 974, sec. 6, R. S. 13:15-6 (N. J. S. A.). The same powers are bestowed upon the New Jersey Turnpike Authority by L. 1948, c. 454, p. 1860, sec. 5, as amended L. 1950, c. 1, p. 14, sec. 5, R. S. 27:23-5(d), (N. J. S. A.) and the New Jersey Highway Authority which operates the Garden State Parkway by L. 1952, c. 16, p. 69, sec. 5, as amended L. 1953, c. 164, p. 1419, sec. 5, R. S. 27:12B-5(d), (N. J. S. A.). The interest of the citizens of New Jersey and the nation in these projects is far greater than their interest in the beach of Atlantic City. Yet the New Jersey Legislature has recognized that the impact of negligently caused injuries is far better sustained by the citizenry who benefit from the activity than by the individual damaged through no fault of his own. This principle has also guided the New Jersey Courts toward an increasingly more liberal approach to the problem of municipal immunity as discussed, *infra*.

The federal and state government interests in the Atlantic City beach area are admitted by the respondent. That interest is one which has grown with numerous interests in other natural resources on which both state and federal authorities have spent millions of dollars. Today the tentacles of federal and state government reach deep into every facet of our lives. The fact that a political unit other than the local governing body contributes funds toward its preservation is not evidence that an activity is so fraught with national public interest that review of a negligence

action arising therefrom is warranted by this Court. If that be true, every activity contributed to by the federal or state government would reach the height of review by this Court. Insofar as New Jersey is concerned, such action would involve a review of any occurrence on New Jersey's thousands of miles of waterways due to the provisions of L. 1954, c. 106, p. 578, sec. 1, R. S. 12:6A-1 (N. J. S. A.) empowering the State Department of Conservation and Economic Development to construct and repair ocean appurtenances on every beach front along all coastal, estuary and inland waterways of New Jersey.. Certainly the procedure for Writ of Certiorari was not intended to devolve to this point. Indeed this Court has stated that the Writ of Certiorari is a discretionary procedure to be exercised sparingly only in cases of particular gravity and general importance. *Ex parte Lau Ow Bow,* 141 U. S. 583 (1891). The importance of review to the petitioner is of no consequence to this Court in determining whether the Writ should issue. *Fields v. United States,* 205 U. S. 292 (1907).

In its attempt to show the magnitude of this provincial issue, the petitioner has advanced only two arguments. First, that federal and state aid has been granted to New Jersey coastal cities to prevent oceanic erosion. Second, Atlantic City's liability insurance premiums for the beach may increase. The petitioner has argued propositions which, at best, rest only on possibility. Insurance premiums *may* increase. Economic prosperity *may* be effected. The fact of the matter is that the gravity of the question is evidenced only by the fact that a $600,000.00 verdict is involved. This "gravity" is in marked contrast to that in *Fields v. United States, supra* wherein this Court determined that the petitioner's loss of his liberty and reputation occasioned by a five year sentence for embezzlement was not sufficiently grave to warrant review. Thus, the

issue of gravity and general importance mentioned in Rule 19, 1(b) does not exist in this case and therefore the Writ should be denied.

B. The Courts below did not render a decision in conflict with applicable State Law.

The petitioner has also failed to sustain the second portion of his burden, i.e., to show conflict between the decisions below and the applicable state law. The standard of persuasion to which the petitioner's presentation to this Court must conform was stated in *Palmer* v. *Hoffman*, 318 U. S. 109, rehearing denied 318 U. S. 800 (1943). This Court held that where the lower federal courts are applying local law, their rulings will not be set aside except upon a plain showing of error. The petitioner's burden was also stated by this Court in *Helvering* v. *Stuart*, 317 U. S. 154 (1942) as producing in this Court a definite conviction of error as to the decisions of the lower federal courts. With these standards of persuasion in mind, we proceed to examine whether the Court of Appeals, which affirmed the District Court unanimously, and the District Court decided this case in conflict with the applicable state law.

In every diversity case the first question posed for the federal court is "What is the state law?". In the opinion of the District Court Judge, who was a distinguished member of the Bench and Bar of New Jersey prior to his appointment to the Federal Bench, it is obvious that he scrutinized the entire history of municipal immunity in New Jersey, pursuant to the duty imposed by *West* v. *American T. & T. Co.*, 311 U. S. 223, 237 (1940). The problem was traced from its inception in *Board of Chosen Freeholders* v. *Strader*, 118 N. J. L. 108 (Sup. Ct. 1840) through *Weeks* v. *City of Newark*, *supra*. The rationale of the old cases as well as the more recent and enlightened

approach was examined. He was led to the conclusion that the New Jersey law dictated that Atlantic City was engaged in a proprietary function in operating the beach under discussion. The absence of a state case on "all fours" necessitated a reliance upon the reasoning of the applicable New Jersey cases rather than the facts of any of them.

The trial court relied in part upon *Weeks* v. *City of Newark, supra.* As with the instant case, *Weeks* involved a novel fact pattern to which the court was called upon to apply the governmental versus proprietary distinction. The applicability of the principles being novel, the court undertook an exhaustive review of the law of New Jersey, its sister states and the views of the text writers. Based upon the sound New Jersey cases preceding *Weeks* and those of foreign jurisdictions, the Appellate Division of New Jersey concluded that the municipal operation of a public bathing pool was a proprietary function. The New Jersey court cited with approval several cases in other jurisdictions wherein injuries occurred on municipally operated public bathing beaches. In each case, the municipality was held to have engaged in a proprietary function and therefore were liable in tort. See *Augustine* v. *Brant*, 249 N. Y. 198, 163 N. E. 732 (Ct. App. 1928), re-argument denied 250 N. Y. 537, 166 N. E. 315 (Ct. App. 1928) and *Norberg* v. *Hagna*, 46 S. D. 568, 195 N. W. 438 (Sup. Ct. 1923) cited at 62 N. J. Super. 176. The state court also relied on *McQuillin, Municipal Corporations* (3d ed. 1950), Vol. 18, sec. 53.113, p. 477:

> "... In view of the tendency of late decisions and development of the law on this subject, the rule will ultimately prevail that in maintaining parks, playgrounds, bathing pools and beaches, and like recreations, the city is performing a local function for its people and it should be held liable on the same basis as a private person or corporation."

The decision was affirmed by the New Jersey Supreme Court on the basis of the Appellate Division's opinion.

Contrary to the petitioner's contention that "the *Weeks* decision did not even mention the *Bisbing* case" (Petitioner's Brief p. 21), (*Bisbing* v. *Asbury Park*, 80 N. J. L. 416, 78 Atl. 196 (E. & A. 1910), *Weeks* alluded to the line of authority relied upon by the petitioner (62 N. J. Super., at 181, 168 A. 2d at 323):

> "We deem our conclusion that Newark's ownership and operation of the Hayes Park West Pool is a proprietary activity to be in accord with the trend toward restricting municipal immunity which runs through modern legal literature and through our recent appellate decisions, particularly the Cloyes case, above. Our Supreme Court there recognized that in recent time municipalities and other governmental agencies have expanded into many new areas, either replacing private enterprises or satisfying new needs which heretofore had not required public activity. This expansion in the area of governmental activity has quite naturally been attended by an increasing number of private injuries resulting from municipal tortious conduct which, *under the older decisions*, would go without remedy. The availability of liability insurance has increased confidence in the ability of local government to carry on without special immunity. Concepts of fair play and justice have changed. Accordingly, courts have had to make new evaluations in the light of the common sense of the situation, and have increasingly declined to extend the concept of governmental immunity to new and growing areas of activity. (23 N. J., at pages 328-9)." (Emphasis added.)

This reference to the "older decisions" was New Jersey's rejection of the petitioner's *archaic approach*. It is interesting to note that the New Jersey courts have adopted the

so-called, New York line of decisions. This authority includes the Florida case of *Ide* v. *St. Cloud*, 150 Fla. 806, 8 So. 2d 924 (1942), where it was specifically held that the operation of a municipally owned bathing beach is a proprietary function. It also includes the New Mexico and Illinois cases entirely abolishing municipal immunity, all of which were adopted with approval by the New Jersey Supreme Court in *McAndrew* v. *Mularchuk*, 33 N. J. 172, 162 A. 2d 820 (1960). The law of Florida, the only other state in the nation whose municipalities engage in the commercial development, advertisement and presentation to the public of their bathing beach facilities to such an extent as does Atlantic City, are completely in accord with the holding of the trial court and the New Jersey cases.

In ruling as they did, the District Court and the Court of Appeals did precisely what was required under the doctrine of *Erie R. Co.* v. *Tompkins*, 304 U. S. 64 (1938). They approached the problem as would the New Jersey courts. Based upon the factually analogous situation in *Weeks* and the enlightening opinion therein, the courts below could come to no other conclusion under *Erie* and the modern New Jersey cases than to follow the trend away from the theory that the king can do no wrong and hold the municipality liable.

The Petitioner has placed heavy emphasis upon *Bisbing* v. *Asbury Park*, *supra*, and indicated that the courts below failed to adhere to this "controlling" case. That *Bisbing* should not have determined the case *sub judice* is clear for several reasons. First, that case is factually distinguishable. There, the public was not invited by mass communication media to flock to the grass plot on which the injury occurred. In fact, the court in *Bisbing* noted that persons were not supposed to walk upon the grass plot where the plaintiff fell. 80 N. J. L. at 421. However, in the case at

bar, just the reverse is true. A great deal of money was spent by Atlantic City to entice persons to use the municipal beach facilities with the hope that such patrons would contribute to Atlantic City's economic well-being. That this calculated program of inducement was successful is evidenced by the fact that one-half of Atlantic City's income is attributable to the presence of beach facilities (350a, 21-23). No such consideration was present in the *Bisbing* case. There the court concluded that the grass plot was completely disconnected with the income producing activities of the city. The court reasoned that there being no benefit to the city arising from the grass strip, there should be no detriment flowing from it. It was not inseparably linked to the multi-million dollar resort business of Asbury Park as is the Atlantic City beach. These factual distinctions alone are sufficient to affirm the holdings below as to the persuasiveness of *Bisbing*. However, other more justifying reasons exist.

Bisbing does not control the instant case for a second reason. The court there found that in addition to the lack of economic benefit, the city owed no duty to the public in constructing or maintaining the grass plot since it was a function gratuitously undertaken. This was precisely the basis upon which immunity was founded in the 1840 pilot case of *Strader, supra*, cited in *Bisbing* wherein the plaintiff's horse and buggy fell from a bridge due to the absence of abutments along the sides. This holding of immunity in the construction of bridges was overruled by statute in 1918. L. 1918, c. 185, sec. 1309, p. 609, R. S. 27:19-10 (N. J. S. A.).

A third reason for the proper refusal of the courts below to follow *Bisbing* and *Strader* is the statement of New Jersey's highest court in *Cloyes* v. *Delaware Township*, 23 N. J. 324, 129 A. 2d 1 (1957) that this line of cases based upon the "public duty" concept of *Strader*, is archaic and

"an approach of another time." The New Jersey Supreme Court went on to state ". . . we have travelled far from Strader . . ." 23 N. J. at 330, 129 A. 2d at 3. The Court concluded:

> "We are satisfied that movement toward Strader is in the wrong direction. Hence we confine our inquiry to the question whether the operation here conducted is proprietary within the holding of more recent authorities, *without regard to whether the result will jell with expressions which antedate them*" 23 N. J. at 332, 129 A. 2d at 5. (Emphasis added.)

The Petitioner argues here, as it did in both courts below, that the concept of immunity by the highest court of New Jersey should be reversed in favor of a return to principles and considerations which were born in an era when fear of municipal bankruptcy was a primary concern. The Petitioner would have this Court adopt the antiquated rationale of *Russell* v. *The Men of Devon*, 2 Term. Rep. 667, 100 Eng. Rep. 359 (K. B. 1788) wherein Judge Ashurst stated "that it is better that an individual should sustain an injury than that the public should suffer an inconvenience." 100 Eng. Rep. at 362. Clearly this is not the direction in which the New Jersey courts have moved. So firm was New Jersey's determination that a person suffering injury due to the negligence of a municipal corporation should have his due recovery that the courts perpetuated the judicially created dichotomy of governmental versus proprietary functions even after the New Jersey Legislature enacted L. 1933, c. 460, sec. 1, p. 1550, R. S. 40:9-2 (N. J. S. A.) which provides that:

> "No municipality or county shall be liable for injury to the person from the use of any public

> grounds, buildings or structures, any law to the contrary notwithstanding."

This statute was first construed in *Leeds* v. *Atlantic City*, 13 N. J. Misc. 868, 181 Atl. 892 (Cir. Ct. 1935), where the plaintiff was injured in Atlantic City's Convention Hall. The court in *Leeds*, as did the District Court below (55a, 11-22), held that the Legislature presumptively knew of the existing dichotomy and therefore did not intend to grant blanket immunity to the municipalities. The court concluded that in the operation of Convention Hall, the eastern entrance of which lies within the metes and bounds description of the beach and which fronts on the boardwalk, Atlantic City was engaged in a proprietary function and therefore not immune under the statute. What appears at first blush to be a conflict of rationale between the Legislature and the New Jersey courts, is dispelled by the fact that the Legislature never changed the statute despite repeated holdings that the act did not grant blanket immunity. Such acquiescence without change in New Jersey has been regarded as approval of the interpretation placed upon a statute by the courts. *State* v. *Joas*, 34 N. J. 179, 168 A. 2d 27 (1961). It should be noted that over a year has lapsed since the Judgment was entered in the District Court in the instant case, and the New Jersey Legislature has not changed the statute in any manner.

The fourth reason for the inapplicability of *Bisbing* is that the result was reached by analogy of the grass plot to public streets. At 80 N. J. L. 442, 78 Atl. 198, the court stated:

> "I conclude, therefore, that thus far there is no difference to be noted between an action brought by an individual to recover damages sustained for the non-repair of the ordinary public street and the circumstances surrounding the present action."

In 1910 when *Bisbing* was decided, municipalities were immune for negligent maintenance of public streets. However, this is no longer the law of New Jersey. *Hammond* v. *County of Monmouth*, 117 N. J. L. 11, 186 Atl. 452 (Sup. Ct. 1936). Thus the two concepts upon which *Bisbing* was decided, i. e., the "public duty" rule and the analogy to the public streets have long since disappeared from New Jersey jurisprudence. In view of this the courts below chose not to revitalize that which has been dead for many years but rather apply the more recent New Jersey concepts in the field of tort law. In so doing the courts below followed the wisdom of Mr. Justice Holmes' comments on "The Path of the Law" in *Collected Legal Papers*, Oliver Wendell Holmes. At p. 187, he stated:

> "It is revolting to have no better reason for a rule of law than it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since and the rule simply persists from blind limitation of the past."

The fifth reason for the inapplicability of *Bisbing* to this case is that the presence or absence of direct pecuniary profit to the municipality is no longer a valid test of the character of the function. It has been noted that one of the reasons for the immunity holding in *Bisbing* is that the city derived no economic benefit from the grass plot. The court at the same time indicated that the result would be different had the locale of the injury produced an economic advantage or benefit to the city. 80 N. J. L. at pp. 423, 424. This test of benefit versus detriment has been qualified by *Weeks* v. *City of Newark*, *supra*, at pages 176-177. There the plaintiff was injured when he slipped in the men's room. The court noted that in the overall operation of Newark's pools

the city sustained a net monetary loss of about $69,000.00 despite nearly a quarter of a million patrons. 62 N. J. Super. at 168, 162 A. 2d at 316. Although economic benefit is a suggested area of inquiry, it is no longer an indispensable requisite. In its stead was placed the query of whether the municipality derives a special advantage from the function. The record is replete with such indications in this case. (87a, 25-27; 91a, 37-92a, 10; 113a, 30-114a, 40; 355a, 41-48). Therefore, the trial court and the Court of Appeals had ample basis for deciding that the Atlantic City beach was proprietary and the city responsible for its negligence in accordance with New Jersey Law.

The final reason for the inapplicability for *Bisbing* is that the case did not construe the statute relied upon by the Petitioner. In its brief to the Court of Appeals the Petitioner made clear that its defense was grounded solely upon R. S. 40:9-2 (N. J. S. A.). (Petitioner's Brief p. 6, l. 10). The *Bisbing* decision predates the statute by more than 25 years and concerns itself with common law tort immunity only. The Petitioner's contention that the holding of *Bisbing* demands an equation of the Atlantic Beach with public grounds in the statute is not borne out by the case. It could not be because the concept of public grounds within the meaning of the statute was not before the court nor did the court have before it the decades of whittling away of municipal immunity with which the courts below were confronted. In following the *Erie* mandate, the District Court and the Court of Appeals had no choice but to follow the view which the Supreme Court of New Jersey would take, the same liberalizing view away from the dictates of another time. Thus, it would have been a violation of the duty imposed by *Erie*, had the lower courts given any persuasive effect to the inapplicable, eroded and outmoded case of *Bisbing* v. *Asbury Park*.

One of the few points on which the Petitioner and Respondent are in accord is the criterion laid down by *Bisbing* as to characterizing an activity as proprietary where the statute authorizing it is permissive. If that case has any life remaining after fifty years of a more enlightened approach, this one point is all that remains. Although not citing *Bisbing*, the court in *Stringfield* v. *Hackensack*, 68 N. J. Super. 38, 171 A. 2d 361 (App. Div. 1961) cert. denied, 36 N. J., 174 A. 2d 921 (1961) used the permissive-mandatory test to conclude that the operation of a public parking lot was a proprietary function.

The language of L. 1894, c. 93, Sec. 1, p. 146, R. S. 40:179-98 (N. J. S. A.) which authorized the operation of the beach by Atlantic City leaves no doubt that the authority was permissive in nature. The statute commences, "It shall be lawful for the common council or other governing body . . ." to operate a public bathing beach. This language is in direct contrast with the mandatory language of statutes, relating to public educational facilities, L. 1953, c. 417, sec. 1, p. 2089, R. S. 18:5-1.1 (N. J. S. A.) and public health programs, L. 1887, c. 68, secs. 9 & 10, pp. 83, 84 as amended L. 1951, c. 69, sec. 68, p. 457, R. S. 26:3-1 (N. J. S. A.). The Petitioner's act of obtaining title to the beach and exploiting its attractiveness was not undertaken at the command of the State of New Jersey as its agent and therefore under the test of *Stringfield* v. *Hackensack*, *supra*, the courts below properly found the operation of the beach to be a proprietary function.

The case of *Kuehler* v. *New Jersey & N. Y. R. Co.*, 104 N. J. L. 333, 140 Atl. 329 (E. & A. 1928) was heavily relied upon by the Petitioner in the courts below. However, that case also relied upon the "public duty" concept discussed *supra*. The Court specifically held that the municipality was not liable in tort because in maintaining the steps upon

which the plaintiff fell, it was performing a public duty, citing *Bisbing, supra* and implicitly adopting the rationale of *Strader, supra.* The severe criticism of this approach by the New Jersey Supreme Court in *Cloyes* v. *Delaware Township, supra,* applies with equal vigor to the *Kuchler* case.

It is respectfully submitted that the courts below correctly ascertained and applied the state law which led to the conclusion that the operation of the beach was a proprietary activity and therefore the Writ of Certiorari should be denied.

POINT II.

The writ should be denied because there is no conflict among the circuits in the application of the rule of *Erie R. Co.* v. *Tompkins.*

In an effort to have this Court grant certiorari the petitioner has alleged a conflict among circuits as to the application of *Erie* which has led to confusion in the lower courts. This allegation does not find sufficient support in the petitioner's brief to invoke the appellate jurisdiction of this Court because no such conflict is shown by petitioner's argument in Point II of its Petition nor the cases cited therein.

Meredith v. *Winter Haven,* 320 U. S. 228 (1943) left little doubt that regardless of the difficulty of the question of state law, the lower federal courts must cope with the issue and ascertain state law "with the aid of such light as was afforded by the materials for decision at hand . . ." 320 U. S. at 238. None of the cases cited by the petitioner demonstrate that the lower Courts violated this rule nor

do they demonstrate any conflict among the circuits in its application.

At pages 13 and 14 of its Petition, Atlantic City has quoted two statements from the 2nd Circuit and the 5th Circuit, respectively, which at first glance appear at odds. Little more than superficial analysis is required to display that the quotations are tempered by the divergent facts of each case. In *Cooper* v. *American Airlines, Inc.*, 14 F. 2d 355 (2nd Cir. 1945) the Court of Appeals found that a 1935 New York case was not controlling because of the serious doubt cast upon its validity by a subsequent holding of New York's highest court. Faced with an obviously new line of reasoning by the New York court of last resort, the 2nd Circuit could do nothing else but follow the lead of the State Court.

In *Polk County, Georgia* v. *Lincoln Nat'l. Life Ins. Co.*, 262 F. 2d 486 (5th Cir. 1959) the Court of Appeals had a vastly different problem before it. A state case over thirty years old clearly covered and decided the same issue of law facing the Court of Appeals. Although apparently disagreeing with the case, the 5th Circuit could not overcome it nor would it expand Judge Frank's approach in *Cooper*, *supra*. That the two cases are not irreconcilable is evidenced by Judge Jones' statement of a principle completely in accord with the views of Judge Frank. Judge Jones ruled:

> "It is the law of Georgia that governs and under the Conformity Act and Erie R. Co. *v.* Tompkins, 304. U. S. 64, 58 S. Ct. 817, 82 L. ed. 1188, this Court is required to determine, *as best it can*, what that law is with respect to the undisputed facts of the case." (Emphasis added.)

He then continued:

> "'A decision of the state court must be on the precise point in controversy in the federal court in order to have binding effect as a precedent therein, but the federal court has the duty, where a *direct* expression by the state court is lacking, to have regard to *any* persuasive data available, such as compelling inferences or logical implications from other related adjudications.'"

Only a strained reading of these two cases will lead to the conclusion that they are in conflict with each other. In an effort to come within the confines of Rule 19, 1(b) the petitioner has also introduced the same strain between *Mason* v. *American Emery Wheel Works*, 241 F. 2d 906 (1st Cir. 1957) cert. denied 355 U. S. 815 (1957) and *Nolan* v. *Transocean Air Lines*, 290 F. 2d 904 (2d Cir. 1961) cert. denied 365 U. S. 293 (1961). In *Mason* the plaintiff brought a personal injury action against a Rhode Island Corporation for the negligent manufacture of an emery wheel. The District Court felt itself bound by a 1928 Mississippi case holding that privity of contract was necessary to bring such an action. The Court of Appeals noted that a recent opinion of the Mississippi Supreme Court gave strong indication that it was moving away from the old, harsh concept, just as did the New Jersey courts in *Clones*, *supra*, and *Weeks*, *supra*. Judge Magruder then stated:

> "Of course it is not necessary that a case be explicitly overruled in order to lose its persuasive force as an indication of what the law is. A decision may become so overloaded with illogical exceptions that by erosion of time it may lose its persuasive or binding force even in the inferior courts of the same jurisdiction." 241 F. 2d at 909.

Judge Magruder also noted that in its most recent decision on the privity question, the Mississippi Supreme Court did not come to grips with the stagnant approach of yesteryear but it observed the abolition of privity in many jurisdictions and alluded to it as the "modern doctrine". Judge Magruder concluded that the Mississippi Supreme Court was prepared to reconsider and revise the harsh rule it had previously announced and therefore the Court of Appeals was not bound by the 1928 decision and could act as it believed the state court would have acted. On appeal to this Court, the Petition for Writ of Certiorari was denied.

The *Nolan* case, *supra*, is not at odds with any of the cases mentioned thus far. There a wrongful death action was dismissed by the District Court as being barred by the California statute of limitations. The Court of Appeals affirmed and was directed by this Court to reconsider its opinion in light of a new California case not previously considered and to "decide what relative weights, as authoritative sources for ascertaining California law the New York Court of Appeals would accord to the Sears-Haro line . . . and to Leeper . . ."; Leeper being the new case on point 290 F. 2d at 905. On its *de novo* examination of the issue the 2nd Circuit specifically referred to Judge Frank's approach in *Cooper, supra*, and rightfully so, considering that such an approach was directed by this Court. The Court of Appeals again affirmed the dismissal and on appeal to this Court a second time, certiorari was denied. 365 U. S. 293 (1961).

The same absence of conflict is even more apparent in the other cases cited by petitioner. Furthermore, this Court has leaned toward the approach of Judge Frank in still another case. In *Ruhlin* v. *New York Life Ins. Co.*, 304 U. S. 202 (1938) a Writ of Certiorari was granted prior to

the annunciation of the decision in *Erie*. Mr. Justice Reed stated that the writ might not have been granted had *Erie* been decided earlier. In referring to the role of the federal courts after *Erie* he stated:

> "As to questions controlled by state law, however, conflict among the circuits is not of itself a reason for granting a writ of certiorari." 304 U. S. at 505-506.
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> "The parties and the federal courts must now search for and apply the entire body of substantive law governing the identical action in the state courts. . . . Now they must merely broaden their inquiry to include the decisions of the state courts, just as they would in a case tried in the state court. . . ."

That the circuits are not in conflict and burdened by confusion as petitioner contends is clear from the foregoing discussion. The standard of their conduct has been set forth by this Court and that standard was adhered to precisely by Judge Cohen. Indeed, he set forth a very precise understanding of his duty. He stated:

> "In such actions, as here, the Federal District Court is but another forum of the state courts and is compelled to make such determination as would a state court on the precise issue presented to it. Its function is not to speculate as what the law will be in the future, or apply a rule of law which it considers better or wiser." Petitioner's Appendix B, pp. 36-37.

It is urged that the courts below decided the present case in strict conformity with the *Erie* mandate and that the decision here rendered by the Court of Appeals in no way conflicts with the views of other circuits.

POINT III.

The decisions of the Courts below involved interpretations of local tort law which should not be reviewed by the Supreme Court of the United States.

Following the *Erie* mandate the trial judge decided that Atlantic City's activities were proprietary and therefore the city was liable in tort under the New Jersey law. On appeal to the Court of Appeals for the 3rd Circuit the Petitioner argued the same thing it now contends, namely, error in the application of *Erie*. Under such circumstances, what is the function of the Court of Appeals? It is to determine whether the trial judge correctly ascertained the state law and applied it. So convinced was the 3rd Circuit that the trial court correctly ascertained the appropriate law that it affirmed Judge Cohen's decision *per curiam* without opinion of its own. It also made the unusual complimentary remarks that the Judgment was "affirmed for the reasons so well stated by Judge Cohen in his excellent opinion. . . ." In its appeal to the Court of Appeals, the Petitioner argued nothing more than what is stated in its Petition for certiorari. All legal postulates being the same, what then is the function of this Court on Petition for Writ of Certiorari? As stated in Rule 19 this Court must decide, as a discretionary matter, whether to hear the merits of this common law personal injury action arising out of an accident on a local New Jersey beach. In arriving at such a decision this Court must decide whether the Court of Appeals

> "has rendered a decision in conflict with the decision of another court of appeals on the same matter; or has decided an important state or territorial ques-

> tion in a way in conflict with applicable state or territorial law; . . . or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision." Rule 19, 1(b).

The Respondent respectfully submits that the instant case does not merit review by this Court of the findings as to New Jersey law. The cases decided by this Court evincing its steadfast refusal to intervene in cases where the lower federal courts have made findings of local law are legion. On questions of local law, this Court has always paid great deference to the views of the judges of the lower federal courts. *Hillsborough* v. *Cromwell*, 326 U. S. 620 (1945); *Steel* v. *General Mills, Inc.*, 329 U. S. 433 (1946); *Gardner* v. *New Jersey*, 329 U. S. 565 (1946); *Huddleston* v. *Dwyer*, 322 U. S. 232 (1943); *District of Columbia* v. *Pace*, 320 U. S. 698 (1943); *Skelly Oil Co.* v. *Phillips Petroleum Co.*, 399 U. S. 667 (1949); *Williams* v. *United States*, 341 U. S. 97 (1950); *General Box Co.* v. *United States*, 351 U. S. 159 (1955); *Sims* v. *United States*, 359 U. S. 108 (1959); *Rogan* v. *Merchants Transfer & Warehouse Co.*, 337 U. S. 530 (1949); *Richards* v. *United States*, 369 U. S. 1 (1962); *United States* v. *Durham Lumber Co.*, 363 U. S. 522 (1960). The rule against review of matters concerning findings of local law is even more vigorously applied where, as in the case at bar, the Court of Appeals and the District Court have reached the same findings. *Appalachian Power Co.* v. *American Institute of Certified Public Accountants*, ... U. S. ..... 80 S. Ct. 16, 4 L. ed 2d 30 (1959).

This Court's refusal to review on Certiorari has been particularly strong where the decision below is rendered by a judge of long experience in the jurisprudence of the state

whose law is being ascertained. In *Helvering* v. *Stuart*, 317 U. S. 154 (1942) the Court of Appeals held Illinois trust law controlled the extent of power of trustees and such power was not sufficient to bring trust income within the Internal Revenue Code so as to make it taxable to the trustees. Mr. Justice Reed stated:

> "This conclusion does not spring from a statute of that state nor even from a clear or satisfying line of decisions. It is, however, the reasoned judgment of the circuit which includes Illinois in which a judge of long experience in the jurisprudence of that state participated. Without a definite conviction of error in the conclusion, this Court will not reverse that judgment.
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> "If reasonably avoidable we should certainly avoid becoming a Court of first instance for the determination of the varied rules of local law prevailing in the forty-eight states." 317 U. S. at 163-164.

To the same effect is *Bernhardt* v. *Polygraphic Co.*, 350 U. S. 198 (1956) which held that special weight is given by this Court to a federal judge's statement of what the law of the state is, where the judge is from the bar of that state. Cf. *Thompson* v. *Consolidated Gas Utilities Corp.*, 300 U. S. 55 (1936) wherein Mr. Justice Brandeis stated:

> "We are always reluctant to pass upon a seriously controverted question of the meaning of a state statute, (in the instant case, state decisions) because our decision, although disposing of the particular case, cannot settle the issue of the proper construction of the statute . . . when not instructed by some decision of a state court, we are disposed, in exercising appellate jurisdiction, to accept the construction given by the lower federal court to a statute of the State, par-

> ticularly when the court is composed, as in this instance, wholly of citizens of the state, familiar with the history of the statute, the local conditions to which it applies, and the character of the State's laws." 300 U. S. at 74-75. (Parenthesis added.)

The above cases are not cited for the proposition that under no circumstances may this Court grant certiorari where a question of local law is concerned. The standard by which the decision below is determined has been enunciated in several opinions of this Court. In *Francis* v. *Southern P. Co.*, 333 U. S. 445 (1947) it was held that a plain showing of error is required for this Court to review lower federal courts in their application of the rule of *Erie*, that in diversity cases federal courts are to apply state law. *Vide*, *Palmer* v. *Hoffman*, 318 U. S. 109, rehearing denied 318 U. S. 800 (1943) a diversity case which involved a railroad grade crossing accident in Massachusetts. The District Court rendered a judgment for the plaintiff which was affirmed by the Court of Appeals with one dissent. The Petitioner argued that the courts below incorrectly applied the Massachusetts statute regarding the burden of proof of contributory negligence. Speaking of the findings below as to the interpretation of the statute, this Court stated:

> "The propriety of applying the rule of the Fitzpatrick case to the cause of action based on the Massachusetts statute may be arguable. But it is not the type of ruling under *Erie R. Co* v. *Tompkins*, 304 U. S. 64, 82 L. ed. 1188, 114 A. L. R. 1487, 58 S. Ct. 817 (1937) which we will readily disturb. Where the lower federal courts are applying local law, we will not set aside their ruling except upon a plain showing of error." 318 U. S. at 118.

In *Spiegel* v. *Commissioner*, 335 U. S. 701 (1948) it was held that a decision of a Court of Appeals as to the law of

a state included within the circuit will be left undisturbed where reasonable arguments can be made based on state cases to support the findings below. Also holding that, if not unreasonable or not clearly erroneous, the decisions of the lower courts will not be reviewed on issues of local law, are *Propper* v. *Clark*, 337 U. S. 472 (1948); *United New York & N. J. S. L. P. Asso.* v. *Halecki*, 358 U. S. 613 (1959) and *United States* v. *Durham Lumber Co., supra.*

On the basis of the foregoing authority the Respondent respectfully urges that the Petitioner has failed to support the burden of persuasion necessary for the issue of a Writ of Certiorari. Doubtless, there has been no plain showing of error by the courts below nor have their findings been shown by the Petitioner to be unreasonable. At best, although not conceding the point, the Petitioner has shown that the lower courts were presented with two divergent lines of authority, one ancient and outmoded, the other recent and in accordance with the movement away from municipal immunity as announced by the New Jersey Supreme Court. Thus, the applicability of the cases relied upon by the Petitioner were no more than arguable. However, as the *Palmer* case, *supra*, indicates, this Court will not disturb the findings below on such a presentation by the moving party, especially in a case involving a simple provincial issue, as here. If, after considering the presentation of the Petitioner, there remains any question as to the applicability of the line of authority espoused by it, the Petition should be denied. Such was the mandate of this Court in *Henderson Co.* v. *Thompson*, 300 U. S. 258 (1936) wherein the plaintiff attacked the validity of a Texas statute prohibiting the use of sweet natural gas for the manufacture of carbon black which was enacted after contracts for such use were entered into. The plaintiff contended

that the statute violated the freedom of contract clause of the Texas Constitution. The complaint to enjoin the enforcement of the statute was dismissed by the District Court. Mr. Justice Brandeis, speaking for this Court, found that there was no Texas case on point which was dispositive of the issue although there was an analogous case. He stated:

> "If we felt any doubts as to its application here (of the analogous case) in the absence of a definite construction of the Constitution of the State by its highest court, we should defer to the Federal Court's understanding of the state law." 300 U. S. at 266.

The opinions cited above make clear the reluctance of this Court to grant certiorari where a question of local law has been resolved by a District Court judge from the state whose law is being applied and affirmed without dissent by the Court of Appeals on the opinion of the trial judge. Therefore, it is respectfully submitted that the Petition for Writ of Certiorari should also be denied on this ground.

In addition to the fact that this case involves only a provincial issue, the very nature of the case demands denial of the Petition. As early as 1892 this Court recognized that a local personal injury action did not merit review by the nation's highest tribunal. In the case of *In re Woods*, 143 U. S. 202 (1892) the Circuit Court of Appeals held that the Minnesota rule precluding a servant from recovering from his master for personal injury due to the negligence of a fellow servant, was inapplicable to the facts. In considering the defendant's Petition for Writ of Certiorari this Court held that only where questions of gravity and importance were involved would review be granted.

> "This must necessarily be so in any view, and especially so when it is considered that the Circuit

> Courts of Appeals were created for the purpose of relieving this Court of the oppressive burden of general litigation which impeded the examination and disposition of cases of public concern. . . .
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> "But we do not regard the inquiry as to whether . . . the law in respect of recovery by a servant against his master for injury received in the course of his employment was properly applied on the trial of this case, as falling within the category of questions of such gravity and general importance as to require the review of the conclusions of the Circuit Court of Appeals in reference to them." 143 U. S. at 205, 206.

This Court thereupon denied the Petition. So also should be the result of the instant case since the issue is not one of gravity or general public importance.

Conclusion.

For the reasons heretofore stated it is urged that the Petition for Writ of Certiorari should be denied.

Respectfully submitted.

CAMPBELL, MANCINI, FOLEY & LEE,
Attorneys for Respondent.

By RALPH W. CAMPBELL,
A Member of the Firm.